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United Nations Commission on International Trade Law
Working Group V (Insolvency Law)
Forty-seventh session
New York, 26-29 May 2015

Annotated provisional agenda for the forty-seventh session of Working Group V (Insolvency Law)

I. Provisional agenda

1. Opening of the Working Group session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of insolvency topics.
5. Other business.
6. Adoption of the report of the Working Group.

II. Composition of the Working Group

1. The Working Group is composed of the following States: Algeria, Argentina, Armenia, Australia, Austria, Belarus, Botswana, Brazil, Bulgaria, Cameroon, Canada, China, Colombia, Côte d'Ivoire, Croatia, Denmark, Ecuador, El Salvador, Fiji, France, Gabon, Georgia, Germany, Greece, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Jordan, Kenya, Kuwait, Liberia, Malaysia, Mauritania, Mauritius, Mexico, Namibia, Nigeria, Pakistan, Panama, Paraguay, Philippines, Poland, Republic of Korea, Russian Federation, Sierra Leone, Singapore, Spain, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of) and Zambia.

2. States not members of the Commission and international governmental organizations may attend the session as observers and participate in the

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deliberations. In addition, invited international non-governmental organizations may attend the session as observers and represent the views of their organizations on matters where the organization concerned has expertise or international experience so as to facilitate the deliberations at the session.

III. Annotations to agenda items

Item 1. Opening of the session

3. The forty-seventh session of Working Group V (Insolvency Law) is scheduled to be held in New York from Tuesday 26 to Friday 29 May 2015. *Please note that there will be no meetings on Monday, 25 May 2015 as it is an official holiday in the United States.* Meeting hours will be from 10 a.m. to 1 p.m. and from 3 p.m. to 6 p.m., except on Tuesday, 26 May 2015 which will commence at 10.30 a.m.

Item 2. Election of officers

4. In accordance with its practice at previous sessions, the Working Group may wish to elect a Chairman and a Rapporteur.

Item 4. Consideration of insolvency topics

5. The Working Group will have before it working papers addressing the following three topics.

(1) Facilitating the cross-border insolvency of multinational enterprise groups

6. At its forty-fourth session (December 2013), the Working Group agreed to continue its work on cross-border insolvency of multinational enterprise groups by developing provisions on a number of issues, some of which would extend the existing provisions of the UNCITRAL Model Law on Cross-Border Insolvency and part three of the UNCITRAL Legislative Guide on Insolvency Law and involve reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (A/CN.9/798, para. 16). The deliberations that took place during the Working Group's forty-fifth (April 2014) (A/CN.9/803) and forty-sixth sessions (December 2014) (A/CN.9/829) will continue at the forty-seventh session.

(2) Obligations of directors of enterprise group companies in the period approaching insolvency

7. At its forty-fourth session, the Working Group agreed on the importance of addressing the obligations of directors of enterprise group companies in the period approaching insolvency, given that there were clearly difficult practical problems in that area and that solutions would be of great benefit to the operation of efficient insolvency regimes. At the same time, the Working Group noted that there were issues that needed to be considered carefully so that solutions would not hinder business recovery, make it difficult for directors to continue to work to facilitate that recovery, or influence directors to prematurely commence insolvency proceedings. In light of those considerations, the Working Group agreed that an examination of how part four of the Legislative Guide could be applied in the enterprise group context and identification of additional issues (e.g. conflicts between a director's

duty to its own company and the interests of the group) would be helpful. The discussion of draft recommendations that commenced at the forty-sixth session (December 2014) (A/CN.9/829) will continue at the forty-seventh session.

(3) Recognition and enforcement of insolvency-related judgements

8. At its forty-fourth session, Working Group V had agreed (A/CN.9/798, para. 30) that at an appropriate time it should seek a mandate from the Commission to commence work on the recognition and enforcement of insolvency-related judgements, which had been discussed at the colloquium held in conjunction with the Working Group's forty-fourth session in December 2013 (A/CN.9/815). At its forty-fifth session, the Working Group agreed (A/CN.9/803, para. 39(b)) that it should seek that mandate from the Commission at its forty-seventh session (2014). At that session, the Commission agreed that, in addition to topics 1 and 2 above, Working Group V's other priority should be to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-derived judgements, which was said to be an important area for which no explicit guidance was contained in the UNCITRAL Model Law on Cross-Border Insolvency. The Commission approved a mandate accordingly (A/69/17, para. 155). The discussion on this topic commenced at the Working Group's forty-sixth session (December 2014) (A/CN.9/829) and will continue at the forty-seventh session.

(4) Documentation for the forty-seventh session

9. The Working Group will have before it notes by the Secretariat on (a) Facilitating the cross-border insolvency of multinational enterprise groups (A/CN.9/WG.V/WP.128); (b) Obligations of directors of enterprise group companies in the period approaching insolvency (A/CN.9/WG.V/WP.129); and (c) Recognition and enforcement of insolvency-related judgements (A/CN.9/WG.V/WP.130).

10. In planning the attendance of their representatives, States and interested organizations may wish to note the following background documents:

(a) The UNCITRAL Legislative Guide on Insolvency Law (2004), including parts three (2010) and four (2013); and

(b) The UNCITRAL Model Law on Cross-Border Insolvency (1997).

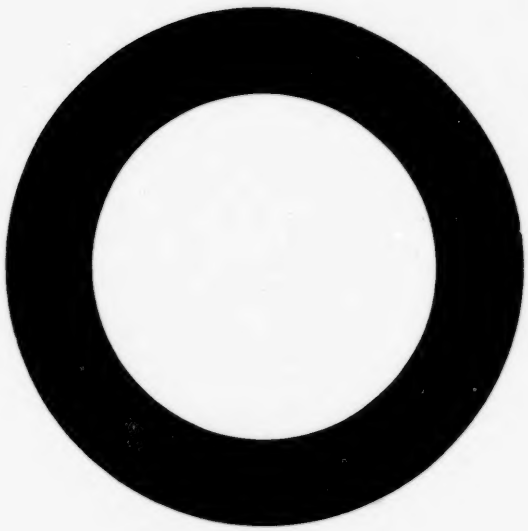
11. UNCITRAL documents are posted on the UNCITRAL website (www.uncitral.org) upon their issuance in all the official languages of the United Nations. Delegates may wish to check the availability of the working papers by accessing the Working Group's page in the "Working Groups" section of the UNCITRAL website.

Item 6. Adoption of the report

12. The Working Group may wish to adopt, at the close of its session, a report for submission to the forty-eighth session of the Commission planned to be held in Vienna, from 29 June to 16 July 2015. The report will include the main conclusions reached by the Working Group. The substance of the Working Group's deliberations at its meeting on Friday morning will be summarily read out for the record and subsequently incorporated into the report.

IV. Scheduling of meetings

13. The Working Group's forty-seventh session will last for four working days. *Please note that there will be no meetings on Monday, 25 May 2015 as it is an official holiday in the United States.* The Working Group may wish to note that, consistent with decisions taken by the Commission at its thirty-fourth session, the Working Group is expected to hold substantive deliberations in the allocated time. The report is to be adopted at the last meeting of the Working Group (on Friday afternoon).



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United Nations Commission on International Trade Law
Working Group V (Insolvency Law)
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New York, 26-29 May 2015

Insolvency Law

Facilitating the cross-border insolvency of multinational enterprise groups

Note by the Secretariat

Contents

		Paragraphs	Page
	Introduction	1-10	2
I.	Provisions for possible inclusion in domestic insolvency law	11-25	4
	A. Introduction	11-13	4
	B. Commencement of insolvency proceedings	14-18	4
	C. Participants	19-23	7
	D. Solvent group members	24	7
	E. Summary of part I	25	8
II.	Draft legislative on the cross-border insolvency of enterprise groups		8
	A. General Provisions		9
	B. Recognition of a foreign proceeding and relief		10
	C. Cooperation with foreign courts and foreign representatives		14
	D. Coordination of concurrent proceedings		18
Annex			19

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Introduction

1. At its forty-fourth session in December 2013, following a three-day colloquium, the Working Group agreed to continue its work on the cross-border insolvency of multinational enterprise groups[1] by developing provisions on a number of issues that would extend the existing provisions of the UNCITRAL Model Law on Cross-Border Insolvency (UNCITRAL Model Law) and part three of the UNCITRAL Legislative Guide on Insolvency Law (UNCITRAL Legislative Guide), as well as involving reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. While the Working Group considered that those provisions might, for example, form a set of model provisions or a supplement to the existing UNCITRAL Model Law, it noted that the precise form they might take could be decided as the work progressed. The Working Group considered this topic at its forty-fifth (April 2014) and forty-sixth (December 2014) sessions.

2. This note addresses two areas of relevance to the cross-border treatment of enterprise group insolvency, drawing upon the issues discussed and the points agreed at the forty-sixth session of Working Group V (December 2014).[2] Part I focuses on the provisions of domestic law that may be required to enable enterprise groups to address financial distress through a coordinated group insolvency solution developed for the group as a whole or for some of its parts. This part covers several issues, such as commencement of insolvency proceedings, procedural coordination and the participation of solvent group members, that are covered by the UNCITRAL Legislative Guide on Insolvency Law, part two and part three, chapter II (the Legislative Guide) and typically would be included in a domestic insolvency law, rather than in a legislative framework for cross-border recognition and assistance. However, the existence of domestic law provisions addressing those issues is likely to be of considerable assistance in developing and implementing a group insolvency solution in the cross-border context.

3. Part II focuses on a cross-border recognition regime and provides a set of draft legislative provisions that is based on the concepts and structure of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) and addresses recognition, relief and cooperation in cross-border insolvency proceedings concerning members of an enterprise group. The draft legislative text responds to numerous comments made at the forty-sixth session of Working Group V that it is difficult to identify the topics and manner in which they should be addressed in order to better facilitate the cross-border insolvency of enterprise groups without seeing the outline of a draft legislative text and understanding the possible structure of enterprise group insolvency solutions.

4. Without seeking to pre-empt the decision the Working Group must make as to the form a text on the cross-border insolvency of enterprise groups might take, the draft text set out in part II provides a set of provisions that would be enacted by a State to provide a regime for cross-border recognition of, and assistance for, foreign insolvency proceedings concerning group members, where those proceedings are a

[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 259 (a); A/CN.9/763, paras. 13-14; *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 326.

[2] For the report of the forty-sixth session, see document A/CN.9/829.

part of what, for the moment, is termed a "group insolvency solution". Those provisions could form an additional part of the Model Law or be developed as a stand-alone instrument.

5. The common purpose of a "group insolvency solution" would be the reorganization or sale as a going concern of the whole or part of the business or assets of one or more of the members of an enterprise group that would, or would be likely to, either maintain or add value to the enterprise group as a whole or to those members of the enterprise group. Such a solution may involve multiple insolvency proceedings, possibly commenced in several States, that are coordinated through one (or, if necessary, several) jurisdiction(s). It is intended to be a flexible concept that may be achieved in different ways, depending on the circumstances of the specific group, its structure, business model, degree and type of integration between group members and so forth.

6. Several scenarios are included in the Annex to this paper (referred to as Scenarios 1 and 2) to facilitate discussion of the more complex points of developing and implementing a group insolvency solution. References to the scenarios are made throughout the following discussion.

7. The draft provisions are based on a "foreign group proceeding", which is defined to be a foreign proceeding (as defined in the Model Law) that is participating in a group insolvency solution. The draft text makes no distinction between main and non-main insolvency proceedings; proceedings that might, be regarded as main or non-main proceedings under the Model Law are to be recognized under this regime as a foreign group proceeding if they are shown to be participating in the development and implementation of a group insolvency solution. The consequences of the distinction between main and non-main proceedings in the Model Law (i.e. the relief available automatically on recognition of a main proceeding) are not part of this draft, which provides that relief is available on a discretionary basis for all recognized proceedings.

8. In addition to recognition, the draft provisions include:

(a) Provisional relief, based on article 19 of the Model Law and available once an application for recognition has been made and relief is urgently required;

(b) Relief available on recognition of the foreign group proceeding. This provision is based on articles 20 and 21 of the Model Law, with additional forms of relief that are likely to be required in the group context. At this stage, no provision has been included for automatic relief and the Working Group may wish to consider whether the draft should include any relief or other effects that would apply automatically on recognition of a foreign group proceeding, similar to those effects specified in articles 12, 20, 23 and 24 of the Model Law; and

(c) Cooperation involving courts and foreign representatives, based upon the recommendations of the Legislative Guide, part three, chapter III.

9. A number of articles of the Model Law are not repeated as they would principally be relevant only if the text to be developed was a stand-alone model

law.[3] The scope and relevance of those articles to any text being developed would need to be considered.

10. Certain new terms are suggested in the draft provisions (see article 2) to capture concepts relevant to the group context: the Working Group may wish to consider the suitability of that terminology.

I. Provisions for possible inclusion in domestic insolvency law

A. Introduction

11. Enterprise groups that do business across borders are often characterized by complex vertical or horizontal structures and varying degrees of integration and interrelationship between group members. Those interrelationships, which typically determine how the group operates and is structured when the business is solvent, may be disturbed by the onset of financial difficulty affecting one, some or even all of the group members that can lead to insolvency. Problems can arise in insolvency simply because the group is constituted by members that are each recognized as having a separate legal personality and existence. Where the group business depends upon some degree of integration between group members, concerning for example provision of financing, components, raw materials and intellectual property, the effect of insolvency on those relationships and the possibility that multiple insolvency proceedings may commence for the multiple separate legal entities within the group can make reorganization of the group's business (whether in whole or part) impossible.

12. Part three, chapter II of the Legislative Guide proposes a number of mechanisms, such as joint application for commencement, procedural coordination and in limited circumstances, substantive consolidation (Legislative Guide, part three, recs. 199-210 and 219-231), that are designed to facilitate the insolvency treatment of enterprise groups, albeit in a domestic context. Chapter III, which deals with international considerations, does not include analogous provisions, but rather focuses on extending the cooperation and coordination provisions of the Model Law to cover multiple proceedings in different jurisdictions concerning different group members.

13. Some consideration might be given to the extent to which the recommendations of part three, chapter II of the Legislative Guide would be relevant in the cross-border context and thus might be included in a revised legislative form in a new text. The following issues have been identified as raising particular concerns in the enterprise group context and might also be the subject of legislative provisions.

B. Commencement of insolvency proceedings

14. A key issue in facilitating the cross-border insolvency of groups relates to whether and how insolvency proceedings for multiple group members might be concentrated in a single or a limited number of jurisdictions. In both Scenarios 1

[3] For example, arts. 3 to 14.

and 2 of the Annex, this issue is relevant to commencement of proceedings in State C for D, E and G (Scenario 1) and D, E and F (Scenario 2). The following discussion is framed in the context of a number of group members participating in a group insolvency solution.

1. Centralizing proceedings relating to group members

15. As previously noted (A/CN.9/WG.V/WP.124, para. 13), several cases have occurred in practice in which the centre of main interests (COMI) of a number of group members has been determined to be located in the same jurisdiction, as shown in Scenario 2. Such a determination may be based upon factors of the kind referred to in paragraphs 145-147 of the Guide to Enactment and Interpretation of the Model Law, in particular that such a jurisdiction is where the central administration of the various group members takes place. Other factors may also be relevant to determining COMI in a group context. These may include the connection and level of integration and reliance between the particular group members by virtue of their group membership and that development and implementation of a group insolvency solution (whether for the whole group or separate parts) will require the participation of certain group members (see Scenarios 1 and 2). While the COMI of each of the members of the enterprise group may be found to be located in one place, it is more likely to occur with respect to distinct parts or divisions of the group that can be reorganized separately. There may be several such locations within one enterprise group (as shown in Scenario 1).

16. Legislative provisions giving effect to the substance of paragraphs 145-147 of the Guide to Enactment and Interpretation and to other factors that might be relevant to the determination of the COMI of group members might be of assistance in developing and implementing a group insolvency solution through one or several central coordinating jurisdiction(s).

17. Even when the COMI of several or many group members is determined to be located in one place, insolvency proceedings for those group members might still be required in other places to deal with assets, business affairs and creditor claims in those places. Those proceedings might be akin to non-main proceedings under the Model Law were that distinction to be used. Additional measures might be required to assist the conduct of those proceedings and their coordination with the proceedings taking place at C in Scenario 2. These might include measures enabling the claims of creditors in D, E and F to be treated in the proceedings in C under the laws of D, E and F and measures limiting the commencement or continuation of insolvency proceedings in D, E and F. While some of those measures might be available as forms of relief additional to those available under articles 20 and 21 of the Model Law under a recognition regime as discussed below in part II, the enactment of relevant provisions in domestic laws might also be required.

2. The COMI of group members is in different locations

18. A different situation will arise where the COMIs (determined in accordance with the types of factors indicated above) of only a limited number of group members are located in the same jurisdiction, as indicated in Scenario 1. While that situation may prove sufficient to enable that jurisdiction to function as the

coordinating centre of the group insolvency solution, other group members that do not have their COMI in that jurisdiction may be treated in several ways:

(a) Proceedings for those other group members (in Scenario 1, companies D, E and G) might commence in C on the basis of criteria such as the location of an establishment or the presence of assets, if applicable. Those proceedings might be analogous to non-main proceedings under the Model Law;

(b) Creditors in D, E and G (Scenario 1) do not seek to commence proceedings in those jurisdictions, but are notified of the proceedings taking place in C;[4]

(c) The claims of creditors of companies D, E and G arising in those jurisdictions on the basis that they are the location of the COMIs of D, E and G, may be treated in C under the laws of D, E and G respectively, subject to safeguards protecting the interests of those creditors and approval by the courts of D, E and G;

(d) Proceedings for companies D, E and G may commence in D, E and G respectively on the basis of the location of their COMIs. Where a group insolvency solution is being pursued, it is desirable that these other proceedings assist the achievement of that group insolvency solution as much as possible through coordination and cooperation and be limited, as far as possible, to the assets and business affairs of the group member in D, E or G (analogous to the type of proceeding that may be commenced following recognition of a foreign main proceeding under article 28 of the Model Law);

(e) The courts in D, E and G might decline to commence proceedings in those jurisdictions in favour of the proceedings taking place in C, on criteria along the lines of those set forth in paragraph 32 of A/CN.9/WG.V/WP.124.[5] Alternatively, proceedings may commence in D, E and G, but be stayed or suspended pending the outcome of the proceedings in C and implementation of the group insolvency solution; or

(f) Where COMI-based proceedings commence in D, E or G and measures of the type available in paragraphs (c) or (e) are not available or those proceedings cannot be limited to local assets and affairs as indicated in paragraph (d), the proceedings in D, E or G will run in parallel with the proceedings in C. Development and implementation of a group insolvency solution must be achieved through coordination and cooperation. The more dispersed the proceedings are, the greater the reliance on coordination and cooperation in order to implement a group insolvency solution.

[4] This possibility is suggested in document A/CN.9/829, para. 45.

[5] These criteria included that the proceedings in D, E or G: (a) lacked purpose; (b) would not improve the protection of stakeholder interests in D, E or G, which could be adequately protected in the proceedings in C; (c) would not improve the realization of assets located in D, E or G; (d) were not required to address claims or realization of assets in D, E or G; (e) would impede achievement of the purpose of the proceedings in C; (f) were not in the global best interests of the enterprise group as a whole; and (g) were opposed by the insolvency representative of the proceedings in country C.

C. Participants

19. At its forty-sixth session, the Working Group recognized the need to identify the parties, including creditors and other stakeholders, that should be permitted to participate in proceedings directed towards achieving a group insolvency solution and to consider whether that participation might be facilitated by appointment of a representative (A/CN.9/829, para. 52). Participation and representation of creditors is discussed in some detail in recommendations 126-136 of the Legislative Guide. In the cross-border context, a foreign creditor's right of participation is recognized in article 13 of the Model Law, although it is limited to what is permitted for creditors under the law of the enacting State. In the enterprise group context, creditor participation is discussed in the Legislative Guide, part three, chapter II, paragraph 26.

20. In addition to creditors, there are other stakeholders who may have an interest in participating in insolvency proceedings in the group context. These stakeholders may fall within the term "parties in interest" as explained by the Legislative Guide (subpara. 12 (d) (d)), which recommends that they have a right to be heard and to appeal (rec. 137), or within the phrase "interested persons" as used in the Model Law (e.g. Preamble, arts. 1 and 22). Article 22 requires the court to ensure the interests of those persons are protected when relief is ordered.

21. An important aspect of the issue of participation in the group context concerns which creditors and other stakeholders of which group members are being considered. Where a solution for a number of group members is being developed, the insolvency representatives of those group members will clearly need to be involved, whether individually or through a committee that might be formed by the different insolvency representatives of the members participating in a group solution (discussed further below). Other parties that may need to participate (leaving aside for separate consideration the extent of that participation) may include creditors of those group members, solvent group members whose participation is necessary to the success of the group solution (see below), and possibly other stakeholders. Some of the issues relating to participation might be resolved through the use of cross-border insolvency agreements, referred to in draft articles 10 and 17 below.

22. As to the proceedings in which participation of those parties might be relevant, a broad approach might be desirable. It may be relevant in Scenario 1, for example, for a representative of the creditors of D to participate in proceedings in E as well as in G. In other words, creditors' interests might need to be represented more widely than in the proceedings of the member of which they are creditors, especially when that member is participating in a more broadly-based insolvency solution.

23. The Working Group may wish to consider whether any of the recommendations referred to above should be reframed as legislative provisions for inclusion in a legislative regime addressing enterprise groups and whether additional provisions may be required.

D. Solvent group members

24. At its forty-sixth session, the Working Group also recognized the need to consider voluntary participation of solvent group members, as well as their creditors

and other stakeholders, in reorganization proceedings. The Legislative Guide, part three, paragraph 152 and recommendation 238 suggest the inclusion of specific provisions in domestic law. Appointment of a representative of a solvent group member to act in relevant insolvency proceedings relating to a group insolvency solution might also be required.

E. Summary of part I

25. Part I has outlined a number of topics for possible treatment in a draft legislative text addressing enterprise groups, including:

(a) Recommendations of part three, chapter II of the Legislative Guide such as joint application for commencement, procedural coordination and substantive consolidation;

(b) Factors relevant to determination of the COMI of an enterprise group member, including those outlined in paragraphs 145-147 of the Guide to Enactment and Interpretation of the Model Law and additional factors specific to enterprise groups;

(c) The possibility of supporting the implementation of a group insolvency solution by limiting the commencement or continuation of some proceedings; limiting the scope of some proceedings commenced to local assets; declining to commence proceedings in deference to foreign proceedings; and recognizing and approving the treatment of creditor claims in foreign proceedings;

(d) Permitting the participation of solvent group members in a group insolvency solution; and

(e) Identifying those creditors and other stakeholders that might participate in proceedings that are part of a group insolvency solution and considering the means of facilitating that participation; for that purpose recommendations from the Legislative Guide, parts two and three might be relevant.

II. Draft legislative provisions on the cross-border insolvency of enterprise groups

Preamble

The purpose of these provisions is to address the structure and conduct of cross-border insolvency proceedings taking place in more than one State concerning two or more members of an enterprise group in a manner that:

(a) Facilitates the development of a range of approaches to the resolution of insolvency, whether affecting the whole or part of the enterprise group;

(b) Takes account of the particularities of the enterprise group context, including the need to address [independent] [integrated] businesses conducted through the separate legal entities that comprise the enterprise group;

(c) Fosters coordination of and cooperation between insolvency proceedings affecting members of an enterprise group;

(d) Permits the participation of any group member, whether solvent or insolvent, that is affected by the insolvency of other group members; and

(e) Facilitates reorganization, going concern sale or liquidation of businesses in a manner that maximizes value and protects the interests of creditors and other stakeholders of affected group members.

A. General Provisions

Article 1. Scope of application[6]

1. These provisions apply in the context of the insolvency of one or more members of an enterprise group where:

(a) Assistance is sought in this State by a foreign court, a foreign group representative or an enterprise group member in connection with a foreign group proceeding [concerning an enterprise group member] [relating to an enterprise group insolvency solution]; or

(b) Assistance is sought in connection with a proceeding under the law of this State in a foreign State where a foreign group proceeding [concerning an enterprise group member] [relating to an enterprise group insolvency solution] is pending or has been applied for; or

(c) A foreign group proceeding and a proceeding under the law of this State [concerning an enterprise group member] [relating to an enterprise group insolvency solution] are taking place concurrently; or

(d) Creditors of different group members, group members other than those subject to insolvency proceedings or other interested persons have an interest in requesting the commencement of, or participating in, a proceeding under the law of this State.

2. This Law does not apply to a proceeding concerning [*designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law*].

Article 2. Definitions

For the purposes of these provisions:

(a) "Enterprise" means any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law;[7]

(b) "Enterprise group" means two or more enterprises that are interconnected by control or significant ownership;[8]

(c) "Control" means the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise;[9]

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[6] UNCITRAL Model Law on Cross-Border Insolvency, art. 1.

[7] UNCITRAL Legislative Guide on Insolvency Law, part three, Introduction, subpara. 4 (b) and footnote 3.

[8] Ibid., subpara. 4 (a).

(d) "Enterprise group member" means an enterprise referred to in subparagraph (b);

(e) "Foreign group member representative" means a person or body, including one appointed on an interim basis, authorized in a [foreign group] proceeding [referred to in subparagraph (h)] to administer the reorganization or the liquidation of the assets or affairs of a debtor that is an enterprise group member or to act as a representative of such a proceeding;[10]

(f) "Enterprise group committee" means a committee comprising foreign group member representatives;

(g) "Enterprise group committee representative" means a person or body designated by an enterprise group committee to act as its representative;

(h) "Foreign group proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of a debtor that is a member of an enterprise group are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation in [the context of] an enterprise group insolvency solution;[11]

(i) "Enterprise group insolvency solution" means a proposal for coordinated reorganization, sale as a going concern or liquidation (of the whole or part of the business or assets) of two or more members of an enterprise group that would, or would be likely to, either maintain or add value to the enterprise group as a whole or to those group members. An enterprise group insolvency solution may be coordinated through a proceeding in a State that is the centre of main interests of at least one enterprise group member.

B. Recognition of a foreign proceeding and relief

Article 3. Recognition of a foreign group proceeding[12]

1. A foreign group member representative[13] may apply to the court for recognition of a foreign group proceeding.

2. An application for recognition shall be accompanied by:

(a) A certified copy of the decision commencing the foreign group proceeding and appointing the foreign group member representative; or

[9] Ibid., subpara. 4 (c).

[10] Based on Model Law, art. 2, subpara. (d). It is assumed, as in the Model Law, that the foreign representative could also be a debtor in possession: see Guide to Enactment and Interpretation, para. 71.

[11] Based on Model Law, art. 2, subpara. (a).

[12] Ibid., art. 15.

[13] As appropriate, the following articles that refer to the foreign group member representative could also apply to an enterprise group committee representative, where such a committee was formed.

(b) A certificate from the foreign court affirming the existence of the foreign group proceeding and of the appointment of the enterprise group member representative; or

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign group proceeding and of the appointment of the foreign group member representative.

3. An application for recognition shall also be accompanied by evidence that:

(a) A group insolvency solution [is being developed] [has been developed] for the whole or a part of the enterprise group;[14]

(b) There is a reasonable prospect of implementing the group insolvency solution; and

(c) The foreign group proceeding is [a necessary or integral part of] [participating in] the group insolvency solution.

4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

Article 4. Presumptions concerning recognition[15]

1. If the decision or certificate referred to in article 3, paragraph 2 indicates that the foreign group proceeding is a proceeding within the meaning of article 2, subparagraph (h) and that the foreign group member representative is a person or body within the meaning of article 2, subparagraph (e), the court is entitled to so presume.

2. The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.

3. In the absence of proof to the contrary, a group member's registered office or principal place of business[16] is presumed to be the centre of that group member's main interests.[17]

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[14] Details of the evidence required to satisfy these requirements could be developed as substantive provisions or included in any commentary or guide to enactment accompanying the text.

[15] Model Law, art. 16.

[16] Principal place of business has replaced the reference in art. 16, para. 3 of the Model Law to "habitual residence" on the basis that while the latter is unlikely to be relevant to the enterprise group context, principal place of business may be relevant for unincorporated group members.

[17] As noted above in para. 14, the factors that are relevant to determination of the centre of main interests in the group context may be wider than those applicable in the case of a single debtor. This could be explained in any commentary or guide to enactment accompanying this text and the relevant factors enumerated.

Article 5. Decision to recognize a foreign group proceeding[18]

1. [Subject to any applicable public policy exception,][19] a foreign group proceeding shall be recognized if:

(a) The foreign group proceeding is a proceeding within the meaning of article 2, subparagraph (h);

(b) The foreign group member representative applying for recognition is a person or body within the meaning of article 2, subparagraph (e);

(c) The application meets the requirements of article 3, paragraph 2;

(d) The application has been submitted to the court referred to in article ...;[20] and

(e) The requirements of article 3, paragraph 3, are met.

2. An application for recognition of a foreign group proceeding shall be decided upon at the earliest possible time.

3. Recognition may be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

4. For the purposes of paragraph 4, the foreign group member representative shall inform the court of changes in the status of the foreign group proceeding or in the status of their own appointment occurring after the application for recognition is made.[21]

Article 6. Relief that may be granted upon application for recognition of a foreign group proceeding[22]

1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign group member representative, where relief is urgently needed to protect the assets of the enterprise group member subject to a foreign group proceeding or the interests of the creditors, grant relief of a provisional nature, including:

(a) Staying execution against the enterprise group member's assets;

(b) Staying the commencement or continuation of insolvency proceedings in this State with respect to the enterprise group member;

(c) Entrusting the administration or realization of all or part of the enterprise group member's assets located in this State to the foreign group member representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;

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[18] Model Law, art. 17.

[19] It may be appropriate to include in the draft text an article along the lines of art. 6 of the Model Law.

[20] It may be appropriate to include in the draft text an article along the lines of art. 4 of the Model Law.

[21] Based on the Model Law, art. 18.

[22] Based on the Model Law, art. 19.

(d) Recognizing existing arrangements concerning the funding of enterprise group members participating in the group insolvency solution where the funding entity is located in this State and authorizing the continued provision of finance under those funding arrangements;

(e) Any relief mentioned in article 7, paragraph 1.

2. [*Insert provisions of the enacting State relating to notice.*]

3. Unless extended under article 7, subparagraph 1(g), the relief granted under this article terminates when the application for recognition is decided upon.

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of a [foreign group proceeding] [group insolvency solution].

Article 7. Relief that may be granted upon recognition of a foreign group proceeding[23]

1. Upon recognition of a foreign group proceeding, where necessary to protect the assets of the enterprise group member or the interests of creditors and facilitate the implementation of a group insolvency solution, the court may, at the request of the foreign group member representative, grant any appropriate relief, including:

(a) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations or liabilities of the enterprise group member;

(b) Staying the commencement or continuation of insolvency proceedings in this State with respect to the enterprise group member to enable a group insolvency solution to be developed;

(c) Staying execution against the assets of the enterprise group member;

(d) Suspending the right to transfer, encumber or otherwise dispose of any assets of the enterprise group member, except where authorized by the court;

(e) Entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to the enterprise group member representative or another person designated by the court;

(f) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the assets, affairs, rights, obligations or liabilities of the enterprise group member;

(g) Extending any provisional relief granted;

(h) Recognizing existing arrangements concerning the funding of enterprise group members participating in the group insolvency solution and authorizing the continued provision of finance under those funding arrangements where the funding entity is located in this State;

(i) Subject to article 8, approving treatment in the foreign group proceeding of the claims of creditors located in this State; or

[23] This article is based upon arts. 20 and 21 of the Model Law, with some additions.

(j) Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State.

2. Upon recognition of a foreign group proceeding the court may, at the request of the foreign group member representative, entrust the distribution of all or part of the assets of the enterprise group member located in this State to the foreign group member representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

Article 8. Protection of creditors and other interested persons[24]

1. In granting or denying relief under article 6 or 7, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.[25]

2. The court may subject relief granted under article 6 or 7 to conditions it considers appropriate.

3. The court may, at the request of the foreign group member representative or a person affected by relief granted under article 6 or 7, or at its own motion, modify or terminate such relief.

C. Cooperation with foreign courts and foreign representatives

Article 9. Cooperation and direct communication between a court of this State and foreign courts or foreign group member representatives[26]

1. In the matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign group member representatives, either directly or through a [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] or other person appointed to act at the direction of the court to facilitate the development and implementation of a group insolvency solution.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign group member representatives concerning members of the same enterprise group and in particular with respect to implementation of a group insolvency solution and the role of the respective courts when such a solution is to be implemented.

[24] Model Law, art. 22.

[25] Any commentary or guide to enactment prepared to accompany this draft text might explain in more detail the notion of adequate protection and the standard that might be applicable, for example, that creditors of the enacting State whose claims are to be treated in the foreign group proceeding under draft article 7 (1)(i) should be no worse off than if those claims were treated in a proceeding under the laws of the enacting State. The Working Group may wish to consider whether this standard should be specified in draft article 8.

[26] Legislative Guide, part three, recs. 240 and 242.

Article 10. Cooperation to the maximum extent possible under article 9[27]

Cooperation to the maximum extent possible for the purposes of article 9 may be implemented by any appropriate means, including:

(a) Communication of information by any means considered appropriate by the court;[28]

(b) Participation in communication with the foreign court or foreign group member representative;

(c) Coordination of the administration and supervision of the affairs of the enterprise group members [subject to foreign group proceedings] [participating in a group insolvency solution];

(d) Coordination of concurrent foreign group proceedings;

(e) Appointment of a person or body to act at the direction of the court;

(f) Approval of the treatment of creditors of the enacting State in a foreign group proceeding;

(g) Approval of cross-border insolvency agreements to facilitate the implementation of a group insolvency solution;[29] and

(h) [*The enacting State may wish to list additional forms or examples of cooperation*].

Article 11. Conditions applicable to cross-border communication involving courts[30]

Communication for the purposes of article 9, paragraph 2, is subject to the following conditions:

(a) The time, place and manner of communication shall be determined between the courts or between the courts and foreign group member representatives;

(b) Notice of any proposed communication shall be provided to interested persons in accordance with applicable law;

(c) A foreign group member representative is entitled to participate in a communication. An interested person may participate in a communication in accordance with applicable law and when determined by the court to be appropriate;

(d) The communication may be recorded and a written transcript prepared as directed by the courts. That transcript may be treated as an official transcript of the communication and filed as part of the record of the proceedings;

(e) Communications shall be treated as confidential only in exceptional cases to the extent considered appropriate by the courts and in accordance with applicable law; and

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[27] Ibid., rec. 241.

[28] This might include providing to the foreign court or the foreign group member representative copies of documents issued by the court or that have been or are to be filed with the court concerning the enterprise group members subject to foreign group proceedings.

[29] See UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009).

[30] Legislative Guide, part three, rec. 243.

(f) Communication should respect: (i) the mandatory rules of the jurisdictions involved in the communication; (ii) the substantive and procedural rights of interested persons; and (iii) the confidentiality of information.

Article 12. Effect of communication under article 9[31]

Participation by a court in communication pursuant to article 9, paragraph 2 does not imply:

(a) A compromise or waiver by the court of any powers, responsibilities or authority;

(b) A substantive determination of any matter before the court;

(c) A waiver by any of the parties of any of their substantive or procedural rights;

(d) A diminution of the effect of any of the orders made by the court;

(e) Submission to the jurisdiction of other courts participating in the communication; or

(f) Any limitation, extension or enlargement of the jurisdiction of the participating courts. Each court is entitled at all times to exercise its independent jurisdiction and authority with respect to matters presented to it and the conduct of the parties appearing before it.

Article 13. Coordination of hearings[32]

1. The court may conduct a hearing in coordination with a foreign court.

2. The substantive and procedural rights of parties and the jurisdiction of each court may be safeguarded by reaching agreement on the conditions to govern the coordinated hearings.[33]

3. Notwithstanding the coordination of hearings, each court remains responsible for reaching its own decision on the matters before it.

Article 14. Cooperation and direct communication between the [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*] and foreign courts and foreign group member representatives[34]

1. In the matters referred to in article 1, the [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*] shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent

[31] Ibid., rec. 244.

[32] Ibid., rec. 245.

[33] These conditions might include: the rules applicable to the conduct of the hearing; the requirements for the provision of notice; the method of communication to be used; the conditions applicable to the right to appear and be heard; the manner of submission of documents to the court and their availability to a foreign court; and limitation of the jurisdiction of each court to the parties appearing before it.

[34] Legislative Guide, part three, recs. 246 and 248.

possible with foreign courts and foreign group member representatives to facilitate the development and implementation of a group insolvency solution.

2. The [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*] is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from foreign courts and foreign group member representatives.

Article 15. Cooperation to the maximum extent possible under article 14[35]

For the purposes of article 14, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

(a) Sharing and disclosure of information concerning enterprise group members participating in a group insolvency solution, provided appropriate arrangements are made to protect confidential information;

(b) Negotiation of cross-border insolvency agreements to facilitate the implementation of a group insolvency solution;

(c) Allocation of responsibilities between [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*] and foreign group member representatives;

(d) Coordination of the administration and supervision of the affairs of the enterprise group members [subject to foreign group proceedings] [participating in a group insolvency solution];[36] and

(e) Coordination with respect to the proposal and negotiation of reorganization plans.

Article 17. Authority to enter into cross-border insolvency agreements[37]

A cross-border insolvency agreement may be entered into to facilitate the implementation of a group insolvency solution.

Article 18. Appointment of a single or the same insolvency representative[38]

1. The court may coordinate with foreign courts with respect to the appointment of a single or the same group member representative to administer insolvency proceedings concerning members of the same enterprise group in different States, provided that the group member representative is qualified for appointment in each of the relevant States.

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[35] Ibid., rec. 250.

[36] This may include: day-to-day operations where the business is to be continued; post-commencement finance; safeguarding of assets; use and disposition of assets; exercise of avoidance powers; communication with creditors and meetings of creditors; submission and admission of claims, including intra-group claims; and distributions to creditors.

[37] UNCITRAL Legislative Guide, rec. 253.

[38] Ibid., rec. 251.

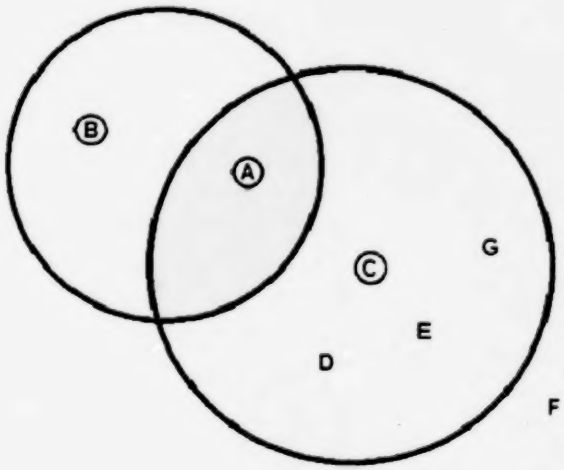
2. To the extent required by applicable law, the group member representative is subject to the supervision of each appointing court.

D. Coordination of concurrent proceedings

Chapter V, articles 28 to 32 of the Model Law address issues of coordination between concurrent proceedings and the adjustment of relief between the different proceedings. The Working Group may wish to consider whether provisions of that nature are required in a new text and if so, the content of those provisions.

Annex

Scenario 1

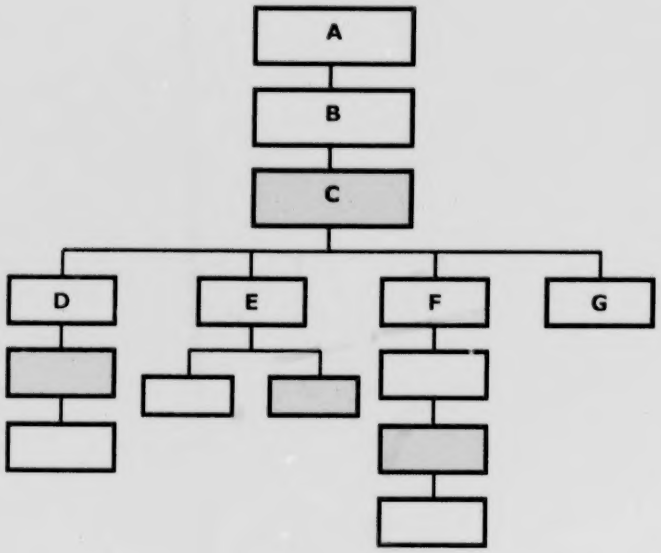


1. Scenario 1 represents an enterprise group with seven separate legal entities, each with its COMI in a different jurisdiction. Two "group solutions" are proposed: the first centred in jurisdiction B (involving entity B and some of entity A's assets or operations) and the second centred in jurisdiction C (involving entities C, D, E, G and some of entity A's assets or operations). F is a group member not involved in either group solution.

2. To facilitate those group solutions, the proceedings in C would need to be able to obtain relief from the courts in the other relevant jurisdictions. For example, the representatives of proceedings in C would need to appear in jurisdiction D and request relief regarding the assets or operations of entities A, C, D, E and G (if any) located in jurisdiction D. It should be possible to request such relief even though the COMIs of most of those entities are not in C (meaning that the proceeding in C would, under the existing Model Law, not be seen as the "main" proceeding for A, D, E and G), and even though jurisdiction D might normally see itself as the proper jurisdiction for a main proceeding for entity D.

3. Similarly, the court in A would need to be able to provide or coordinate relief in response to separate requests from B and C, regarding the two separate group solutions, even though entity A's COMI is in A. Scenario 1 does not depict the ownership structure of the group (unlike Scenario 2) but only its geographic distribution. The legislative provisions that might be required to facilitate development and implementation of a group insolvency solution are discussed in above in part I.

Scenario 2



1. Scenario 2 represents a company with two major product lines. Product 1 is manufactured, sold and installed by subgroups D and E and product 2 by subgroup F. Company G is a solvent sales company in another jurisdiction, but D, E, F and G all have inter-company indebtedness to C. With the exception of C and F, which are co-located, the other group companies are located in different States. The overall group COMI is in State C; this is not disputed. The main asset-owning companies are shaded on the chart. Management faces three possibilities:

(a) Addressing the insolvency and restructuring of C, keeping all subsidiaries whole;

(b) As in (a), but also involving insolvencies and restructuring of D, E and F if it proves necessary to control the actions of creditors or if material debt forgiveness is required by the creditors of those companies, with the same office holders being appointed to C, D, E and F based on the group COMI being located in State C; or, as a last resort,

(c) If (b) is not possible for any reason, such as a holdout by creditors of D, there will be attempts to restructure the businesses of D and E together, based on the COMI of D and, separately, of C and F together based on the shared COMI.

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Insolvency Law

Directors' obligations in the period approaching insolvency: enterprise groups

Note by the Secretariat

Contents

		Paragraphs	Page
	Introduction	1-4	2
	UNCITRAL Legislative Guide on Insolvency Law, part four: Directors' obligations in the period approaching insolvency — enterprise groups	1-27	3
I.	Background	4-14	3
II.	Elements of the obligations of directors of enterprise group companies in the period approaching insolvency	15-27	6
	A. The nature of the obligations	15-18	6
	Recommendations 267-268		7
	B. Identifying the parties who owe the obligations	19-22	10
	C. Conflicting obligations	23-27	11
	Recommendations 269-270		12

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Introduction

1. Part three of the UNCITRAL Legislative Guide on Insolvency Law deals with the treatment of enterprise groups in insolvency and provides background on the nature of enterprise groups; reasons for conducting business through enterprise groups; what constitutes an enterprise group by reference to concepts such as ownership and control; and regulation of enterprise groups. Part four of the Legislative Guide addresses the obligations of directors in the period approaching insolvency, discussing issues associated with directors' obligations in that period and, in particular, the rationale for imposing obligations specific to that period by way of the operation of insolvency, rather than corporate, law. Neither part addresses the specific issues that might affect the obligations of directors who perform that function for one or more enterprise group members.

2. At its forty-fourth session (December 2013), the Working Group agreed on the importance of addressing the obligations of directors of enterprise group companies in the period approaching insolvency, given that there were clearly difficult practical problems in that area and that solutions would be of great benefit to the operation of efficient insolvency regimes. At the same time, the Working Group noted possible solutions needed to be considered carefully so that they did not hinder business recovery, make it difficult for directors to continue to work to facilitate that recovery, or influence directors to prematurely commence insolvency proceedings. In light of those considerations, the Working Group agreed that an examination of how part four of the Legislative Guide could be applied in the enterprise group context and identification of additional issues (e.g. conflicts between a director's obligations to its own company and the interests of the group) would be helpful.

3. Deliberations on this topic commenced at the Working Group's forty-sixth session (December 2014) on the basis of a draft prepared by the Secretariat following consultation with an informal expert group as requested by the Working Group (A/CN.9/WG.V/WP.125).

4. This note has been prepared by the Secretariat on the basis of the deliberations and conclusions of the Working Group at its forty-sixth session (December 2014) (A/CN.9/829, paras. 12-32). Set out below are revisions to draft recommendations 267 to 270 (previously numbered 255 (EG), 256 (EG), 256 (EG) (bis) and 256 (EG) (ter)), together with the first draft of an accompanying commentary. In accordance with the decision of the Working Group, the text has been prepared as an additional section of part four of the Legislative Guide. Notes for the Working Group on revisions to the recommendations are included in the footnotes.

UNCITRAL Legislative Guide on Insolvency Law, part four: Directors' obligations in the period approaching insolvency — enterprise groups

Introduction and purpose of this section

1. This section of part four builds upon recommendations 255 to 266 of the first section, which address the obligations of directors of an individual company in the period approaching insolvency. Focusing on the nature of the obligations and the steps that might be taken to discharge those obligations (as established in recommendations 255 and 256), this section proposes how those recommendations could be revised for application in the context of enterprise groups. Recommendations 257 to 266 of the first section of part four continue to apply in the enterprise group context as drafted, however cross-references in those recommendations to recommendations 255 and 256 should be read as references to recommendations 267 and 268.

2. Additional recommendations (recommendations 269 and 270) have been drafted to address the situation where a director is appointed to, or holds a managerial or executive position in, more than one group member and conflicts arise in discharging the obligations owed to the different members.

3. This section uses the same terminology as other parts of the Legislative Guide. To provide orientation to the reader, this section should be read in conjunction with part three and the first section of part four.

I. Background

4. The first section of part four of the Legislative Guide considers the obligations of directors of individual companies in the period approaching insolvency, providing information on how those obligations are treated under current laws. While some jurisdictions have developed provisions to impose obligations on directors in the period approaching insolvency, the relative advantages and disadvantages of such regimes remain the subject of debate.[1] The first section of part four underlines the need for early action to be taken when businesses face financial difficulty in order to avoid rapid decline and to facilitate rescue and reorganization. It also notes that while there has been an appropriate refocusing of insolvency laws in many countries towards increasing the options for that early action to be taken, there has been little corresponding attention paid to creating appropriate incentives for directors to use those options.[2] The first section encourages the development of appropriate incentives by identifying for incorporation in the law relating to insolvency the basic obligations a director of an enterprise may have in the period approaching insolvency and the steps that might be taken to discharge those obligations. Those obligations would become enforceable only once insolvency proceedings commenced.

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[1] Ibid., paras. 8-10.

[2] Legislative Guide, part four, para. 6.

5. In the enterprise group context, the issue of directors' obligations in the period approaching insolvency does not appear to be clearly or widely addressed by national legislation. While the concept of enterprise groups has been considered and developed in many jurisdictions, the question of the obligations of directors in such situations remains somewhat confused.[3]

6. Part three of the Legislative Guide, which addresses the insolvency treatment of enterprise groups, notes that enterprise groups are often characterized by varying degrees of economic integration (from highly centralized to relatively independent) and types of organizational structure (vertical or horizontal) that create complex relationships between group members and may involve different levels of ownership and control. These factors, together with adherence to the single entity principle and the widespread lack of any explicit acknowledgement of the group reality in the legislation applicable to individual group members, raise a number of issues for directors of enterprise group members. Adherence to the single entity principle typically requires directors to promote the success and pursue the interests of the company they direct, respecting the limited liability of that company and ensuring that its interests are not sacrificed to those of the enterprise group, irrespective of the interests of the group as a whole, the position of the director's company in the group structure, the degree of independence or integration among group members and the incidence of ownership and control. But where that company's business is part of an enterprise group and reliant, at least to some extent, on other group members for the provision of vital functions (e.g. for financing, accounting, legal services, suppliers, markets, management direction and decision-making or intellectual property), addressing the financial difficulties of that company in isolation is likely to be difficult, if not, in some cases, impossible. Part three discusses in some detail the current economic reality of enterprise groups and, in the context of insolvency, the impact of treating enterprise group members as unrelated entities on resolving the financial difficulties of some group members or of the group more widely.[4]

7. The requirement to act in the interests of the directed company may be further complicated in the group context when a director of one group member performs that function or holds a managerial or executive position in other group members. In such a situation, it may be difficult for the director to separately identify the interests of each of those group members and treat them in isolation: the interests of those group members may need to be balanced against each other, against the possibly competing economic goals or needs of other group members and against those of the enterprise group collectively. Moreover, achieving that balance may require assessment of both short and long term implications for the interests of the different group members and may even require the acceptance of some detriment, even if only in the short term, to the interests of individual group members in order to achieve a longer term benefit.

8. Some examples of situations in which a director might need to balance the interests of individual group members and those of the group more widely may include where one group member provides finance to another group member or acts

[3] A/CN.9/WG.V/WP.115, para. 40. This paper outlines the manner in which a number of different jurisdictions address this issue.

[4] Legislative Guide, part three, chap. I.

as a guarantor for finance provided by an external lender to another group member, in an attempt to keep the group as a whole afloat, including its own business; where one group member agrees to transfer its business or assets or surrender a business opportunity to another group member or to contract with that member on terms that could not be considered commercially viable, but where to do so may ultimately benefit the business of group member agreeing to the transfer; or where a group member enters into cross-guarantees with other group members to assist the group as a whole to use its assets more effectively in financing group operations.

9. Such considerations might be relevant in the period approaching insolvency, when greater control and coordination of the groups' activities may be required to maximize efficiency and design solutions to resolve the financial difficulties of the group as a whole or for some of its parts. At that time, there may also be more opportunities for advantage to be taken of more vulnerable and dependent group members in order to benefit other members, such as through transfers of assets, diversion of business opportunities and use of those group members to conduct more risky transactions or activities or to absorb losses and bad assets.

10. To address the best interests of the directed group member, a director may require a degree of flexibility to weigh the various competing interests and act for the benefit of other group members or the group as a whole where that action coincides with the best interests of the directed member. To the extent that the course of action a director chooses to follow in such circumstances is reasonable and instrumental in avoiding insolvency or minimizing its impact on the directed group member they should not be liable for breach of their obligations.

11. While, as noted above, few laws address directors' obligations in the enterprise group context, courts in different jurisdictions have accorded differing degrees of recognition to the practical reality of the manner in which enterprise groups operate. While the focus is still upon directors exercising their powers for the benefit of their own group member or members, some jurisdictions may permit directors to have regard, for example, to the direct or derivative commercial benefits accruing to that group member from pursuing a particular course of action with other group members and to the extent to which their group member's prosperity or continued existence depends on the well-being of the group as a whole. Typically, however, collective benefit is not a sufficient justification by itself. Moreover, directors might also be required to take into account any reasonably foreseeable detriments that might flow to their group member as a result of the course of action taken and to consider the position of their group member's unsecured creditors, particularly where that member's solvency might be affected. The latter consideration is of particular importance where the transaction is a guarantee or security for a loan to another group member.

12. Other jurisdictions have allowed directors of group companies to act in the interests of the overall group when certain conditions are met, such as that the group has a balanced and firmly established structure; that the group member took part in the long-term and coherent group policy; and that the directors in good faith reasonably assumed that any detriment suffered by their group member would in due course be made good by other advantages. Another approach permits a director of a group member to act in the interests of the parent provided it does not prejudice the group member's ability to pay its own creditors and the directors are authorized, either by the constitution of the group member or by shareholders, depending on

whether the group member is wholly or partly owned. Under those laws, the group member should not be insolvent at the time the director acts, nor should it become insolvent by virtue of that action.

13. This section identifies the extent to which a director of an enterprise group member may take account of considerations beyond the group member they direct in fulfilling their obligations in the period approaching insolvency and the safeguards that should apply. Those considerations will, to a greater or lesser extent, reflect aspects of the economic reality of the enterprise group. This section proposes principles for inclusion in the law concerning the obligations of directors of enterprise group companies in the period approaching insolvency. These principles may serve as a reference point and can be used by policymakers as they examine and develop appropriate legal and regulatory frameworks. Whilst recognizing the desirability of achieving the goals of insolvency law (outlined in part one, chapter I, paragraphs 1-14 and recommendation 1) through early action and appropriate behaviour by directors, it is also acknowledged that there are threats and pitfalls for entrepreneurs that may result from overly draconian rules.

14. This section does not deal with the obligations of directors that may apply under criminal law, company law or tort law. It focusses only on those obligations that may be included in the law relating to insolvency and become enforceable once insolvency proceedings commence.

II. Elements of the obligations of directors of enterprise group companies in the period approaching insolvency

A. The nature of the obligations

15. The underlying rationale of imposing obligations on directors in the proximity of insolvency is addressed in the first section of part four, paragraphs 1 to 7, and remains equally applicable in the enterprise group context. The obligations of directors of a group member continue to be the same basic obligations as established in recommendation 255, but provision might be made to permit the broader context of the economic reality of the enterprise group to be taken into account in determining the steps that should be taken by a director to avoid liability for breach of those obligations. Relevant factors to be considered might include the position of the enterprise group member in the enterprise group, the degree of integration between enterprise group members (as mentioned in recommendation 217 of part three) and the possibility of maximizing value in the group by designing a solution to the group's financial difficulties that includes the whole group or some of its parts. Such solutions may require a director of a group member in financial difficulty to take steps that may appear, at first glance, to be detrimental to that group member, but that will ultimately achieve a better result for it and ensure the continuation of its business and maximization of its value. Taking those same steps in circumstances where they are not likely to benefit the group member in financial difficulty may expose directors to liability for failure to discharge their obligations reasonably.

16. One consideration for directors evaluating the steps to be taken to address the group member's financial difficulties is the impact of those steps on creditors of that

group member, especially when wider group interests are to be accommodated. Recommendation 255 requires directors to have due regard to the interests of creditors, as well as of other stakeholders. The interests of creditors of the group member may be safeguarded by establishing a "no worse off" standard — i.e. that creditors will be no worse off under the steps that are taken than they would have been had those steps not been taken.

17. The first section of this part discusses the types of steps that a director might reasonably be expected to take in order to address financial difficulty, avoid the onset of insolvency and, where it is unavoidable, to minimize its impact (part four, chap. II, para. 5). Those steps would continue to be relevant in the group context and might be supplemented by additional steps, depending on the factual situation, that will effectively require some degree of mutual assistance and cooperation with other group members. Those additional steps might be affected by the position of the group member in the enterprise group and require consideration of whether more value might be preserved or created by assisting the implementation of a solution for the enterprise group as a whole or some of its parts, than by taking steps that relate only to the individual group member. Consideration might be given to assessing the directed member's obligations, both financial and legal, to other group members; the transactions that should (or should not) be entered into with other group members; possible sources and availability of post-commencement finance, including its provision by the directed group member to other group members; and the impact of possible solutions, whether limited to the directed group member or involving the group more widely, on creditors and other stakeholders of the directed group member. A director might also consider taking steps to organize informal negotiations with creditors, such as voluntary restructuring negotiations, with a view to devising a solution for the enterprise group as a whole or some of its parts where that will benefit the directed group member.

18. Where insolvency is unavoidable and formal proceedings are to be commenced, a director might consider the court in which those proceedings should commence, particularly when there is a possibility of making a joint application with other group members and procedurally coordinating those proceedings, as discussed in part three.[5]

Recommendations 267-268

Purpose of legislative provisions

The purpose of these provisions addressing the obligations of those responsible for making decisions concerning the management of an enterprise group member that arise when insolvency is imminent or unavoidable is:

(a) To protect the legitimate interests of creditors and other stakeholders of the enterprise group member;

(b) To ensure that those responsible for making decisions concerning the management of an enterprise group member are informed of their roles and responsibilities in those circumstances;

[5] Legislative Guide, part three, recs. 202-210.

(c) To recognize the impact of the enterprise group member's position in the enterprise group upon the manner in which the group member should be managed to address its imminent or unavoidable insolvency and the obligations of those responsible for making decisions concerning the management of that group member, including in situations where they are also responsible for making decisions concerning the management of other group members; and

(d) To permit an enterprise group member to be managed, where appropriate, in a manner that will maximize value in the enterprise group by promoting approaches to resolve insolvency for the enterprise group as a whole or for some of its parts, whilst ensuring that the creditors of that group member and its other stakeholders are no worse off than if that group member had not been managed so as to promote such approaches to resolution.

Paragraphs (a)-(d) should be implemented in a way that does not:

(a) Unnecessarily adversely affect successful business reorganization of the enterprise group member, taking into account the possible benefit of maximizing the value of the enterprise group and promoting an insolvency solution for the enterprise group as a whole or some of its parts, the position of the group member in the enterprise group and the degree of integration between group members;

(b) Discourage participation in the management of companies, particularly those experiencing financial difficulty; or

(c) Prevent the exercise of reasonable business judgement or the taking of reasonable commercial risk.

Contents of legislative provisions

The obligations[c]

Variant 1

267. (255) The law relating to insolvency should specify that from the point in time referred to in recommendation 257, the persons specified in accordance with recommendation 258 will have the obligation(s) to have due regard to the interests of creditors and other stakeholders of the enterprise group member of which they are a director and insofar as not inconsistent with that obligation, they may take

[c] **Note to the Working Group**

Variant 1 parallels recommendation 255 of part four, with some additional wording referring to the group context and additional considerations in subparagraph (b) specifically addressing the group context, as agreed by the Working Group at its forty-sixth session (A/CN.9/829, paras. 16-19).

Variant 2 has been prepared by the Secretariat to emphasize the primary importance of a director's obligations to the companies of which he or she is a director. Accordingly, Variant 2 specifies, in paragraph (a), that recommendation 255 is the starting point for the obligations of a director in the group context. Paragraph (b), which introduces the group context, incorporates wording from the chapeau and paragraph (b) of Variant 1 that extends the considerations to be taken into account in satisfying the obligations in recommendation 255 to include aspects specific to the group context and to give effect to several suggestions made at the forty-sixth session (e.g. A/CN.9/829, para. 18).

steps to promote an insolvency solution for the enterprise group as a whole or some of its parts. In order to do so, reasonable steps may include those directed to:

(a) Avoiding insolvency of their group member; and

(b) Where insolvency of that group member is unavoidable, minimizing its impact on the creditors and other stakeholders of that group member, taking into account the possible benefit of maximizing the value of the enterprise group as a whole, the position of the enterprise group member in the enterprise group and the degree of integration between enterprise group members.

Variant 2

267. (255)(a) The law relating to insolvency should specify that the obligations established in recommendation 255 will apply to a director of a company that is a member of an enterprise group.

(b) Insofar as not inconsistent with those obligations, the director of an enterprise group member may take reasonable steps to promote a solution that addresses the insolvency of the enterprise group as a whole or some of its parts. In so doing, the director may take into account the possible benefits of maximizing the value of the enterprise group as a whole, the position of the enterprise group member in the enterprise group and the degree of integration between enterprise group members, whilst ensuring that the creditors of the group member and its other stakeholders are no worse off than if steps had not been taken to promote such a solution.

Reasonable steps for the purposes of recommendation 267[7]

268. (256)For the purposes of recommendation[s] 255 and 267, and to the extent [possible] [not inconsistent with the obligations of the director to the group member of which they are director] reasonable steps in the enterprise group context might include, in addition to the steps outlined in recommendation 256:

1. (a) Evaluating the current financial situation of the enterprise group member and of the enterprise group to consider whether more value might be preserved or created by considering a solution for the enterprise group as a whole or some of its parts;

(b) Considering the financial and other obligations of the group member to other enterprise group members, whether transactions should be entered into with other enterprise group members, and possible sources and availability of post-commencement finance;

(c) Evaluating whether the enterprise group member's creditors and other stakeholders would be better off under an insolvency solution for the enterprise group as a whole or some of its parts;

(d) Assisting the implementation of an insolvency solution for the group as a whole or some of its parts; and

[7] **Note to the Working Group**: Draft recommendation 268 has been revised as agreed by the Working Group at its forty-sixth session (A/CN.9/829, paras. 21-24).

(e) Holding and participating in informal negotiations with creditors, such as voluntary restructuring negotiations,[8] where organized for the enterprise group as a whole or some of its parts.

2. Where formal insolvency proceedings are to be commenced, considering the court in which they should be commenced, whether a joint application[9] with other relevant enterprise group members is possible or appropriate and whether proceedings should be procedurally coordinated.[10]

B. Identifying the parties who owe the obligations

19. In the group context, identifying those responsible for management decisions may be more complex than in the case of a single company. Various layers of management and influence can affect the affairs of any single group member and the manner in which it conducts its business, particularly in the vicinity of insolvency. Such influence may undermine the ability of the directors of a group member to take appropriate steps to address the financial difficulties of the directed member or involve that member in the financial difficulties of other group members, to the detriment of the creditors of the directed group member. This may occur in numerous circumstances, such as where the boards of the two members consist of substantially the same persons; where the majority of the board of one group member is nominated by the other member, which is in a position of control; where one group member controls the management and financial decision-making of the group; and where one group member interferes in a sustained and pervasive manner in the management of another group member, typically in the situation of a parent and controlled group member.

20. There may also be some groups in which it is difficult to identify the precise boundaries between group members because management responsibilities across different boards are blurred. In addition, relevant executives and decision makers may be employed by group members several steps removed from the group member in question and the separate identity and liability of that group member may be generally disregarded in the daily business of the group. In such situations, serious issues may arise as to the obligations of such persons with respect both to the actual business conducted by the group member in question and to the group member by which they are employed.

21. Persons that might be considered to be a director in the group context could include another group member or the director of another group member, including a shadow director[11] of that other group member. While some laws do not permit a group member to be formally appointed as a director of another group member, such a group member might nevertheless be regarded as a shadow director of that other member when it exercises influence over or directs the activities of that group member.

22. Paragraphs 13 to 16 of the first section of this part discuss the parties who owe the obligations discussed above. Recommendation 258 adopts a broad formulation,

[8] Legislative Guide, part one, paras. 2-18.
[9] Ibid., part three, recs. 199-201.
[10] Ibid., part three, recs. 202-210.
[11] Ibid., part four, footnote 11 to para. 13.

providing that it should include any person formally appointed as a director and other person exercising factual control and performing the functions of a director. Paragraph 15 of the commentary notes the types of function that may be expected to be performed by such a person.

C. Conflicting obligations

23. It may often be the case in enterprise groups that a director performs that function or holds a management or executive position in more than one group member, whether as a result of the ownership and control structure of the group, the alliances between group members, family ties across the group or some other aspect of the manner in which the business or businesses of the group are organized.[12] Whatever the reason, a director who sits on the boards of a number of different group members may face, in the period approaching insolvency, potential conflicts between the obligations owed to those different group members as they attempt to identify the course of action most likely to preserve value and provide the best solution to the financial difficulties of each group member. The nature and complexity of the conflict may relate to the position of the directed entities in the group hierarchy, the related degree of integration between group members and the incidence of control and ownership. Where a director sits on the boards of the parent and controlled group members, for example, they may need to be able to demonstrate that any transaction involving the parent took into account and was fair and reasonable to the controlled group member.

24. In addition, the interests of the directed group members may be closely intertwined with the group more widely, requiring the economic reality of the group as a whole to be considered. In such circumstances, steps that may be regarded as detrimental to company operating as a stand-alone entity may be reasonable when considered in that broader context. The business of a subsidiary, for example, may be generally dependent on the business of the group more widely and it may be appropriate for that subsidiary to provide funding in the short term for other members in order to keep that wider business operating and ultimately save the business of the subsidiary itself.

25. Directors facing such a conflict might be expected to act reasonably and take adequate and appropriate steps to address the situation. That might require a director, depending on the factual situation, to identify the precise nature of the conflict in accordance with applicable law and determine how it might be addressed. It may be sufficient in some circumstances for the director to disclose the conflict to the affected boards of directors, while in other circumstances wider disclosure to creditors and other stakeholders, including the boards of directors of other group members, may be desirable. Such disclosure may be sufficient to support the director's continuing integrity and any lack of the impartiality or independence required can be assessed against the circumstances disclosed.

26. It may be appropriate in some circumstances for the director to step back from participating in any decisions relating to the conflict that are to be taken by the affected boards or attending meetings at which related issues are to be discussed.

[12] See Legislative Guide, part three, paras. 6-15.

Appointment of additional or substitute board member may be possible in some cases and, if the conflict cannot be resolved, the director may consider, as a last resort, resigning from one or other of the affected boards. This might potentially include resignation from the board of an insolvent or a solvent group member. While that option of resignation may free the director of the dilemma, it simultaneously neglects the larger problem and may exacerbate the situation, especially in the period approaching insolvency, if it leaves the affected group member or members without the expertise necessary to address their financial difficulties.

27. A good board process that analyses the situation of the respective group members giving rise to the conflict and records the reasons for the action taken may be helpful to the director in discharging obligations with respect to the conflict.

Recommendations 269-270

Purpose of legislative provisions

The purpose of provisions on conflict of obligations is to address the situation where a director of one enterprise group member holds that position or a management or executive position in another or other enterprise group members, whether the parent or a controlled group member. That situation may give rise, in the period approaching insolvency, to a conflict between the obligations owed to the different group members, which may have an impact upon the steps to be taken to discharge those obligations.

Contents of legislative provisions

[Conflict of obligations] [Conflicting obligations]

269. (256 bis) The law relating to insolvency should address the situation where, in the period approaching insolvency, a director of an enterprise group member who holds that position or a management or executive position in another or in other enterprise group members has a conflict between the obligations owed in relation to the creditors and other stakeholders of those different group members.

Reasonable steps for the purposes of recommendation 269

Variant 1[13]

270. (256 ter) The insolvency law may specify that a director faced with such conflicting obligations should take reasonable steps to manage those conflicts, including obtaining advice to establish the exact nature of the different obligations; disclosing to creditors, other directors of relevant members and other stakeholders situations likely to lead to conflicting obligations; not participating in any decision by the board of directors of the same group member on the matters giving rise to such conflicts; [seeking the appointment of] [appointing] an additional director when the conflicting obligations cannot be reconciled; and, as a last resort,

[13] **Note to the Working Group. Variant 1** includes revisions agreed by the Working Group at its forty-sixth session (A/CN.9/829, paras. 27-29). Since the appointment of an additional director might not be within the powers of the conflicted director, different drafting is proposed for that action.

resigning where there is no alternative course of action available and resignation will not exacerbate the situation.

Variant 2[14]

270. (256 ter) The insolvency law may specify that a director faced with conflicting obligations should take reasonable steps to manage those conflicts. Those steps may include obtaining professional advice to establish the exact nature of the conflicting obligations and how to manage them, and disclosing to other directors, creditors and other stakeholders the nature of the conflict and the situations in which the conflict is likely to arise. In determining whether conflicts are adequately managed, a director should consider whether the steps taken are sufficient so that the creditors and other stakeholders of the group members of which they are a director are in no worse a position than they would have been had the conflicts not arisen. As a last resort, the director may need to resign from any group member in relation to which the conflict is not adequately manageable.

Variant 3[15]

270. (256 ter) The insolvency law may specify that a director faced with such conflicting obligations should take reasonable steps to manage those conflicts. Reasonable steps may include:

(a) Obtaining advice to establish the exact nature of the different obligations;

(b) Identifying the parties to whom the conflict of obligations must be disclosed and disclosing relevant information;

(c) Identifying when the director should not (i) participate in any decision by the boards of directors of any of the relevant group members on the matters giving rise to such conflicts, or (ii) be present at any board meeting at which such issues are to be considered;

(d) [Seeking the appointment of] [Appointing] an additional director when the conflicting obligations cannot be reconciled; and

(e) As a last resort, where there is no alternative course of action available and resignation will not exacerbate the situation, resigning from the relevant board(s) of directors.

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[14] **Note to the Working Group**. **Variant 2** was proposed at the forty-sixth session, but not considered for lack of time (A/CN.9/829, para. 30).

[15] **Note to the Working Group**. **Variant 3** is a drafting suggestion prepared by the Secretariat. It is based upon Variant 1, but seeks to specify the steps to be taken more broadly. Rather than listing, for example, the specific persons to whom the director should disclose a conflict of interest, it indicates the reasonable step to be identifying the parties to whom disclosure should be made and then disclosing relevant information. The commentary to the recommendation might indicate some of the parties to whom disclosure might be appropriate, including other members of the boards of affected group members or possibly board of directors of other group members. Paragraph (c) builds upon some text added at the forty-sixth session to include the possibility of a director absenting themselves from a meeting that is to consider issues to which the conflict relates. In paragraph (d), since the appointment of such an additional director might not be within the powers of the conflicted director, different drafting is proposed.

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Insolvency Law

Cross-border recognition and enforcement of insolvency-related judgements

Note by the Secretariat

Introduction

1. At its forty-seventh session (2014), the Commission gave Working Group V (Insolvency Law) a mandate to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-related judgements.

2. At its forty-sixth session in December 2014, Working Group V (Insolvency Law) considered a number of issues relevant to the development of a legislative text on the recognition and enforcement of insolvency-related judgements, including the types of judgements that might be covered, procedures for recognition and grounds to refuse recognition. The Working Group agreed that the text should be developed as a stand-alone instrument, rather than forming part of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law),[1] but that the Model Law provided an appropriate context for the new instrument.

3. The draft text set forth below is drafted in the form of a model law to be given effect through enactment by a State and thus, when it refers to "this State", it means the enacting State. The content and structure of the draft text draws upon the Model Law, as suggested by the Working Group (A/CN.9/829, para. 63). References to the relevant Model Law sources of certain definitions and articles are indicated in the footnotes (e.g. draft articles 8 and 9 follow elements of articles 15, 16 and 17 of the Model Law).

[1] A/CN.9/829, paras. 60 and 74.

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4. The draft text seeks to give effect to the conclusions of the Working Group at its forty-sixth session, particularly with respect to the types of judgement to be included (A/CN.9/829, paras. 54 to 58), procedures for obtaining recognition and enforcement (A/CN.9/829, paras. 65 to 67) and the grounds for refusal of recognition (A/CN.9/829, paras. 68 to 71).

5. One issue not considered in the draft is the treatment of judgements arising in what might be considered competing insolvency proceedings (A/CN.9/829, para. 75). This issue might be relevant in the types of scenario outlined in working paper A/CN.9/WG.V/WP.128 concerning cross-border treatment of the insolvency of enterprise groups, which is also to be discussed at the Working Group's forty-seventh session.

Draft model law on the recognition and enforcement of insolvency-related judgements

Preamble

The purpose of this Law is to provide for recognition and enforcement of insolvency-related judgements in cross-border insolvency cases in a predictable and transparent manner, in order to promote:

(a) Cooperation between the courts of this State and courts of other States involved in cross-border insolvency cases;

(b) Greater legal certainty for trade and investment;

(c) Fair and efficient administration of cross-border insolvency cases;

(d) Protection and maximization of the value of the debtor's assets and affairs, and distributions to creditors; and

(e) Simplification of the procedure and reduction in the cost and time required for recognition and enforcement of insolvency-related judgements.

Article 1. Scope of application

1. This Law applies where:

(a) Recognition and enforcement of an insolvency-related judgement is sought in this State by a foreign representative or other person entitled to seek enforcement of such a judgement in connection with a foreign proceeding; or

(b) Recognition and enforcement of an insolvency-related judgement is sought in a foreign State in connection with a proceeding under the law of this State.

2. This Law does not apply to [...].

Article 2. Definitions

For the purposes of this Law:

(a) "Foreign proceeding" means a collective judicial or administrative proceeding pursuant to a law relating to insolvency in which the assets and affairs of a debtor are [or were] subject to control or supervision by the court for the purpose of reorganization or liquidation;[2]

(b) "Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;[3]

(c) "Judgement" means any judicial or administrative decision, whatever it may be called, including a decree or order, and a determination of costs and

[2] This definition is based on the Model Law, art. 2, subpara. (a).

[3] Ibid., art. 2, subpara. (d).

expenses provided that the determination related to a judicial or administrative decision,[4] and any decision ordering provisional or protective measures;[5]

(d) "Insolvency-related judgement" means a judgement that is closely related to a foreign proceeding and was issued after the commencement of that proceeding. A judgement is presumed to be "closely related to a foreign proceeding" if it has an effect upon the insolvency estate of the debtor and either: (i) is based on a law relating to insolvency; or (ii) due to the nature and legal basis of its underlying claims, would not have been issued without the commencement of the foreign proceeding.[6] An insolvency-related judgement would include any equitable relief, including the establishment of a constructive trust, provided in that judgement or required for its enforcement. Insolvency-related judgements may include judgements concerning any of the following matters:

(i) Turnover of property of the insolvency estate;

(ii) Sums due to the insolvency estate;

(iii) Sale of assets by the insolvency estate;

(iv) Requirements for accounting related to the insolvency proceeding;

(v) *Variant 1*

Overturn of transactions involving the debtor or assets of the insolvency estate that have the effect of either reducing the value of the estate or upsetting the principle of equitable treatment of creditors;[7]

(v) *Variant 2*

Resolution of actions to avoid or otherwise render acts detrimental to creditors ineffective,[8] including undervalued transactions, preferential transactions and transactions intended to defeat, delay or hinder the ability of creditors to collect claims where the effect of the transaction was to put assets beyond the reach of creditors or potential creditors or to otherwise prejudice the interests of creditors;[9]

(vi) Modification or enforcement of a stay of actions in a foreign proceeding;[10]

(vii) Validity of a secured claim;

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[4] This definition is taken from the Convention of 30 June 2005 on Choice of Court Agreements (2005 Hague Convention), art. 4.

[5] This last phrase relating to provisional measures is taken from the draft global judgements convention prepared by The Hague Conference on Private International Law, 2001 version, art. 23.

[6] The draft article might indicate that for the purposes of this model law, an insolvency-related judgement would not include a judgement imposing a criminal penalty.

[7] The wording of this variant is based on the UNCITRAL Legislative Guide on Insolvency Law, rec. 87.

[8] The wording of this variant is based on the UNCITRAL Model Law on Cross-Border Insolvency, art. 23.

[9] This wording is taken from the Legislative Guide, rec. 87.

[10] Some consideration might be given to the issue of possible overlap with provisions of the Model Law, such as art. 22, para. 3.

(viii) A cause of action pursued by a creditor with approval of the court, based on [an insolvency] [a foreign] representative's decision not to pursue that cause of action;

(ix) Liability of a director in the period approaching insolvency;[11]

(x) Confirmation of a plan of reorganization or liquidation or approval of a [composition] [voluntary restructuring agreement];

(xi) Whether a particular debt can be discharged; and

(xii) Recognition of the discharge of a debtor.

Article 3. International obligations of this State[12]

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

Article 4. Competent court or authority[13]

The functions referred to in this Law relating to recognition and enforcement of insolvency-related judgements shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*].

Article 5. Authorization to seek enforcement of an insolvency-related judgement in a foreign State[14]

A party entitled to enforce an insolvency-related judgement given under the law of this State is authorized to act in a foreign State to seek enforcement of that judgement, as permitted by the applicable foreign law.

Article 6. Additional assistance under other laws[15]

Nothing in this Law limits the power of a court or a [*insert the title of any other person or body administering the recognition and enforcement of an insolvency-related judgement under the law of the enacting State*] to provide to a party seeking recognition and enforcement of an insolvency-related judgement in this State additional assistance or relief under other laws of this State, in particular those laws relating to decisions concerning the commencement, conduct, administration and conclusion of insolvency proceedings.

Article 7. Interpretation[16]

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

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[11] See Legislative Guide, part four dealing with the obligations of directors of a company in the period approaching insolvency, recs. 255, 259 and 260.

[12] This draft article repeats art. 3 of the Model Law.

[13] Ibid., art. 4, with revisions specific to insolvency-related judgements.

[14] Ibid., art. 5.

[15] Ibid., art. 7.

[16] Ibid., art. 8.

Article 8. Recognition and enforcement of an insolvency-related judgement[17]

1. A foreign representative or other person entitled under the law of the State in which the judgement was issued to seek enforcement of an insolvency-related judgement may request the court in this State to recognize and enforce that judgement.[18]

2. A party seeking recognition and enforcement of an insolvency-related judgement shall provide:

(a) A copy of the insolvency-related judgement;

(b) A certified statement of whether the insolvency-related judgement is a final judgement or, if not, the identification of the appellate court where any appeal is pending, and the status of the appeal;

(c) Evidence that the party against whom relief is sought received notice of the proceeding in which the insolvency-related judgement was issued and had an opportunity to be heard prior to the issue of the judgement; and

(d) Evidence that the party against whom relief is sought was provided notice of the request in this State for recognition and enforcement of the insolvency-related judgement.

3. The court may require translation of documents supplied in support of recognition of the insolvency-related judgement into an official language of this State.

4. The court is entitled to presume that documents submitted in support of a request for recognition of the insolvency-related judgement are authentic, whether or not they have been legalized.

Article 9. Decision to recognize and enforce an insolvency-related judgement[19]

An insolvency-related judgement shall be recognized and may, upon recognition, be enforced without review of the merits of the judgement provided:

(a) The insolvency-related judgement is within the meaning of article 2, subparagraph (c);

(b) The person seeking enforcement of the insolvency-related judgement is a person within the meaning of article 2, subparagraph (b), or another person entitled to seek enforcement of the judgement under article 8, paragraph 1;

(c) The requirements of article 8, paragraph 2, are met;

(d) The court from which recognition is sought is the court referred to in article 4; and

(e) Article 10 does not apply.

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[17] This draft article is based on art. 15 of the Model Law, paras. 1, 2 and 4. Draft para. 4 of this article is based on art. 16, para. 2, of the Model Law.

[18] An insolvency-related judgement may also be raised as a defence to an action concerning the same matter/claim in the enacting or another State.

[19] This draft article is based on art. 17 of the Model Law.

Article 10. Grounds to refuse recognition of an insolvency-related judgement[20]

The court may decline to recognize an insolvency-related judgement if the party against whom relief is sought demonstrates that:

(a) The insolvency-related judgement is subject to review in the originating State or the time limit for seeking review has not expired and the originating State would not enforce the insolvency-related judgement because of the availability of such review;

(b) The party against whom the proceeding giving rise to the insolvency-related judgement was instituted:

(i) Was not notified of the institution of that proceeding in sufficient time and in such a manner as to enable a defence to be arranged, unless the party entered an appearance and presented their case without contesting notification in the originating court, provided that the law of the originating State permitted notification to be contested; or

(ii) Was notified of the institution of that proceeding in a manner that is incompatible with fundamental principles of this State concerning service of documents;

(c) The insolvency-related judgement was obtained by fraud in connection with a matter of procedure;

(d) Recognition and enforcement of the insolvency-related judgement would be manifestly contrary to the public policy of this State;

(e) The proceeding in which the insolvency-related judgement was issued was manifestly contrary to the fundamental principles of procedural fairness of this State;

(f) The insolvency-related judgement is inconsistent with a prior judgement given in this State in a dispute between the same parties;

(g) The insolvency-related judgement is inconsistent with an earlier judgement given in another State involving the same parties, provided that the earlier judgement fulfils the conditions necessary for its recognition in this State;

(h) Recognition and enforcement of the insolvency-related judgement would interfere with the administration of the debtor's insolvency proceedings[21] or would be inconsistent with a stay or other order entered in insolvency proceedings in this or another State;

(i) *Variant 1*

The party against whom the proceeding giving rise to the insolvency-related judgement was instituted did not consent to the exercise of jurisdiction in that proceeding and the foreign court exercised jurisdiction over that party solely on a basis that was unreasonable or unfair. A basis of jurisdiction is not

[20] These grounds are based upon those discussed and agreed upon at the Working Group's forty-sixth session (A/CN.9/829, paras. 68-71).

[21] At the forty-sixth session, it was suggested that this ground might be included as an alternative to restricting recognition to judgements emanating from proceedings that might be regarded as main or non-main proceedings (A/CN.9/829, para. 70).

unreasonable or unfair solely because it is not an acceptable basis of jurisdiction for courts in this State.

(i) *Variant 2*

The party against whom the proceeding giving rise to the insolvency-related judgement was instituted did not consent to the exercise of jurisdiction in that proceeding and the foreign court exercised jurisdiction over that party solely on
one of the following grounds:

(i) The presence of that party's property in the jurisdiction of the foreign court, when the property is unrelated to the insolvency-related judgement;

(ii) The nationality of a different party; or

(iii) Any other basis that was unreasonable or unfair; a basis of jurisdiction is not unreasonable or unfair solely because it is not an acceptable basis of jurisdiction for courts in this State.

Article 11. Severability[22]

Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognized or enforced under this Law.

Article 12. Provisional relief[23]

1. From the time recognition and enforcement of an insolvency-related judgement is sought until a decision is made, the court may grant relief of a provisional nature where relief is urgently needed, including:

(a) Staying the disposition of any assets of any party or parties against whom the insolvency-related judgement has been issued; or

(b) Granting other legal or equitable relief, as appropriate, within the scope of the insolvency-related judgement.

2. [*Insert provisions (or refer to provisions in force in the enacting State) relating to notice.*]

3. Unless extended by the court, relief granted under this article terminates when a decision on recognition and enforcement of the insolvency-related judgement is made.

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[22] At its forty-sixth session, the Working Group noted that it might be advisable to provide for severability so as to enable enforcement of only a part of a judgement in cases where grounds for refusal of other parts might exist, certain elements such as a punitive damages award might thus be excluded (A/CN.9/829, para. 61). This draft article is based on article 15 of the 2005 Hague Convention (see note 4).

[23] This draft article is based upon paras. 1, 2 and 3 of art. 19 of the Model Law; para. 4 of article 19 is included among the grounds for refusal of recognition under draft art. 10, subpara. (h).